Supreme Court, U.S.
FILED

'97 678 OCT 15 1997

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DONALD HERZOG,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JUDD BURSTEIN
Counsel of Record
BURSTEIN & FASS LLP
99 Park Avenue
New York, New York 10016
(212) 681-0606

Attorneys for Petitioner
Donald Herzog

ON THE PETITION:
JUDD BURSTEIN
MARC FERNICH

Questions Presented

1. Does the test for *Brady* materiality used by the Second Circuit in this case — whether undisclosed impeachment evidence "would have affected the verdict" — conflict with this Court's recent decision in *Kyles v. Whitley*, 514 U.S. 419 (1995), and the great weight of authority from around the Circuits?

2. Does the Second Circuit's application of Fed. R. Evid. 806 in this case conflict with its own precedent and that of other Circuits?

List of Parties

Petitioner was one of 14 defendants charged in a 60 count indictment. The others were John Zagari, Pasquale Maselli, Frank Salerno, Frank Trapani, Angelo DiPalo, Peter Del Cioppo, George Merusi, James Rogan, Raymond Ryder, David Zanoli, Morton Wagner, Alfred Christiansen and Charles Shay. Of these 14 defendants, 11 went to trial, two — Zagari and Ryder — pled guilty to substantially reduced charges, and one — Maselli — died prior to trial. Of the 11 defendants who went to trial, fully *eight* were completely acquitted of all charges against them. Three — petitioner, Shay and Christiansen — were partially convicted. Christiansen subsequently died, and his appeal was withdrawn.

Table of Contents

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINION BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS . 2

STATEMENT OF THE CASE 3

A. INTRODUCTION 3

B. THE *BRADY* ISSUE 4

C. THE RULE 806 ISSUE 7

REASONS FOR GRANTING THE PETITION 13

I. THE SECOND CIRCUIT'S CONCEPTION OF *BRADY* MATERIALITY CONFLICTS WITH *KYLES*, AS INTERPRETED ACROSS THE CIRCUIT 13

II. THE SECOND CIRCUIT'S APPLICATION OF RULE 806 IN THIS CASE CONFLICTS WITH ITS OWN PRECEDENT AND THAT OF OTHER CIRCUITS 23

CONCLUSION 30

TABLE OF AUTHORITIES

	Page(s)
Cases:	
Banks v. Reynolds, 54 F.3d 1508 (10th Cir. 1995)	19, 22
Brady v. Maryland, 373 U.S. 83 (1963)	*passim*
East v. Scott, 55 F.3d 996 (5th Cir. 1995)	16
Guerra v. Johnson, 90 F.3d 1075 (5th Cir. 1996)	21
Kyles v. Whitley, 514 U.S. 419 (1995)	*passim*
United States v. Badalmente, 507 F.2d 12 (2d Cir. 1974), *cert. denied*, 421 U.S. 911 (1975)	15
United States v. Bagley, 473 U.S. 667 (1985)	22
United States v. Brumel-Alvarez, 991 F.2d 1452 (9th Cir. 1992)	20
United States v. Burton, 937 F.2d 324 (7th Cir. 1991)	12, 23, 30
United States v. Cuffie, 80 F.3d 514 (D.C. Cir. 1996)	14, 16, 17
United States v. Friedman, 854 F.2d 535 (2d Cir. 1988)	11
United States v. Graham, 858 F.2d 986 (5th Cir. 1988), *cert. denied*, 489 U.S. 1020 (1989)	23
United States v. Hanna, 55 F.3d 1456 (9th Cir. 1995)	18
United States v. LeRoy, 687 F.2d 610 (2d Cir. 1982), *cert. denied*, 459 U.S. 1174 (1983)	22

	Page(s)
United States v. Moody, 903 F.2d 321 (5th Cir. 1990)	11, 23
United States v. O'Conner, 64 F.3d 355 (8th Cir. 1995)	21
United States v. Payne, 63 F.3d 1200 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1056 (1996)	14, 15
United States v. Rosario, 111 F.3d 293 (2d Cir.), *petition for cert. filed* (U.S. Sept. 2, 1997) (No. 97-5845)	23
United States v. Smith, 77 F.3d 511 (D.C. Cir.), *reh'g denied*, 85 F.3d 646 (D.C. Cir. 1996)	18
United States v. Steinberg, 99 F.3d 1486 (9th Cir. 1996)	20
United States v. Trzaska, 111 F.3d 1019 (2d Cir. 1997)	24, 27, 28, 29
United States v. Velasco, 953 F.2d 1467 (7th Cir. 1992)	25
United States v. Wali, 860 F.2d 588 (3d Cir. 1988)	12, 23
United States v. Wong, 78 F.3d (2d Cir. 1996)	15, 16
United States v. Wuagneux, 683 F.2d 1343 (11th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983)	25
United States v. Zackson, 6 F.3d 911 (2d Cir. 1993)	22
United States v. Zagari, 111 F.3d 307 (2d Cir. 1997)	*passim*
Statutes and Rules:	
18 U.S.C. § 1341	1, 2

	Page(s)
18 U.S.C. § 1343	1
18 U.S.C. § 1952	1
18 U.S.C. § 1956	1
18 U.S.C. § 1962	1
26 U.S.C. § 7206(2)	2
28 U.S.C. § 1254(1)	2
Fed. R. Crim. P. 33	7
Fed. R. Evid. 801(d)(2)	*passim*
Fed. R. Evid. 803(3)	25, 26, 28, 29
Fed. R. Evid. 806	*passim*
Other Authorities:	
M. Graham, *Federal Practice and Procedure* (1996)	12

No.: _____

In The

Supreme Court Of The United States

October Term, 1997

DONALD HERZOG,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Donald Herzog respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, affirming his conviction for one count of violating the RICO statute (18 U.S.C. § 1962(c)); one count of RICO conspiracy (18 U.S.C. § 1962(d)), four counts of wire fraud (18 U.S.C. § 1343); six counts of money laundering (18 U.S.C. §§ 1956 (a)(1)(A)(i), (A)(ii) and (B)(i)); one count of violating the Travel Act (18 U.S.C. § 1952); three counts of mail fraud (18 U.S.C. § 1341);

one count of tax conspiracy (18 U.S.C. § 1341); and one count of tax fraud (26 U.S.C. § 7206(2)).[1]

Opinion Below

The Court of Appeals' opinion, *United States v. Zagari*, 111 F.3d 307 (2d Cir. 1997), appears at 1a.[2]

Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Second Circuit denied Herzog's petition for rehearing on July 17, 1997. (59a) This petition timely follows.

Constitutional and Statutory Provisions

The constitutional and statutory provisions relevant to this petition appear at 61a-63a. They are as follows:

FED. R. CRIM. P. 33

FED. R. EVID. 801(d)(2), 806

U.S. CONST. AMENDS. V, VI.

---

[1] Finding various errors in Herzog's 151 month sentence, the Second Circuit vacated it and remanded for resentencing, which has been stayed pending the disposition of this petition.

[2] Numbers followed by "a" refer to pages of the Appendix to this petition. Numbers preceded by "A:" refer to pages of the Joint Appendix in the Court of Appeals. Numbers preceded by "T:" refer to pages of the trial transcript not included in the Joint Appendix.

Jurisdiction in the District Court

The United States District Court for the Southern District of New York (Brieant, D.J.) had jurisdiction under Titles 18 and 26, United States Code.

Statement of the Case

A. INTRODUCTION

As the Second Circuit aptly noted, this is a case that involves the intersection between criminal law and the "strictures of environmental law." (3a) Herzog was convicted of running organized crime-backed landfills at Matamoras, Pennsylvania and Rochester, New York. The government's theory was that he and his alleged cohorts defrauded the relevant state licensing authorities — in particular, the Pennsylvania Department of Environmental Resources ("PADER") — into believing they were dumping "clean fill"[3] or "processed construction and demolition ("C&D")" debris,[4] when in fact they were illegally accepting untreated C&D[5] without the necessary permits. The defendants countered that, having engaged in months of litigation and negotiation with PADER

---

[3] According to the indictment, PADER regulations defined "clean fill" as "'[u]ncontaminated, nonwater-soluble, non-decomposable inert solid materials.'" (A: 127)

[4] According to the trial proof, "processed C&D" is C&D stripped of its contaminants — *e.g.*, wood, metal, plaster, etc.

[5] According to the indictment, C&D consists of "'solid waste resulting from the construction or demolition of buildings and other structures, including but not limited to, wood, plaster, metals, asphaltic substances, bricks, block and unsegregated concrete.'" (A: 127) (Quoting PADER Regulation § 271.1)

concerning its jurisdiction to regulate the dumping of C&D debris, they had a genuine, good faith belief in the legality of their conduct. Thus, the critical issue at trial was whether or not the defendants acted with fraudulent intent? The case was a close one, as eight of the 11 defendants who went to trial were completely acquitted, and Herzog himself was acquitted of fully *37* of the 55 counts in which he was named.

B. THE *BRADY*[6] ISSUE

1. THE PIVOTAL ROLE OF JERRY DOTEY

As the Court of Appeals itself recognized, Jerry Dotey was "an important [g]overnment witness." (16a) The landfills' purported "engineer,"[7] he was the only witness who was directly involved in Herzog's alleged operation, and the only one with first-hand knowledge of his supposed *scienter*.

2. THE NEWLY DISCOVERED EVIDENCE

After trial, the defense uncovered what the Second Circuit called "alarming" (23a) new evidence — never disclosed by the prosecution — that Dotey was not only insane, but harbored bizarre neo-Nazi leanings. As recounted by the Court of Appeals:

> [S]ubsequent to trial, [defendants] unearthed evidence that Dotey had been clinically

---

[6] *See Brady v. Maryland*, 373 U.S. 83 (1963).

[7] Among other credibility problems, cross-examination revealed Dotey to be a fraud as an engineer, as he had duped Herzog into believing that he had a valid engineering license. (T: 556, 562, 715-17, 741-43, 871-72, 6387)

diagnosed as a "pathological liar" with "serious psychological problems" and "a multiple personality disorder." Specifically, Dotey apparently suffered from delusions that he had a second German identity, and believed that he had been born in Nazi Germany to a Gestapo "spymaster," "smuggled into the United States," and "switched at birth with an American baby." He professed to have been kidnapped, brainwashed, and tortured by "the Group," a neo-Nazi cabal seeking to take over the world and create a "Fourth Reich" through, among other methods, genocide, mind control, genetic engineering, and state-sponsored slavery.[8]

In his various conversations with federal officials and psychologists, Dotey claimed that he was tortured by Dr. Joseph Mengele in the presence of former CIA director Richard Helms. Mengele, Dotey said, also kidnapped American children and brought them to "an evil lair in Florida" for "unspeakable purpose[s]." In addition, Dotey stated that he had been told by Mengele that Mengele had trained Lee Harvey Oswald.

---

[8] In light of Herzog's Judaism, proof of Dotey's Nazi propensities would have made for powerful cross-examination on the issues of bias and motive. (A: 864-65, 891, 973) In this regard, one specific assertion by Dotey stands out as especially troubling: his belief that the Group "'routinely (virtually daily) implicates many, many *innocent people all over this country in crimes they have not committed.*'" (23a) (emphasis supplied)

Dotey maintained that the Group, which he said espoused a Hitlerian philosophy of Aryan nationalism and totalitarian control over all aspects of human behavior, was planning the mass extermination of American Jews in Nazi-style death camps. He held them responsible for other horrific activities, ranging from Watergate to forcing Dotey to watch the rape of his wife and the beating of his pregnant sister. He also asserted that the Group's constituents included at least one former U.S. President, top federal officials, and numerous Supreme Court Justices and other federal judges.

Throughout the years, Dotey has been investigated by federal agents for assorted conduct. For example, Dotey claimed to have murdered witnesses to the assassination of President Kennedy. He sparked an FBI investigation after stealing money from the Atlantic Richfield Company ("ARCO"), his former employer, then staging his own kidnapping, alleging that black, Puerto Rican and Cuban terrorists "beat him up, took [the] money and held him prisoner on a boat off the coast of South Carolina," and forging a ransom note to President Carter demanding the release of Cuban prisoners. He later asserted that ARCO agents, dressed in SS regalia, had tortured, drugged and hypnotized him, programming him to massacre President Reagan and everyone else at the 1985 inauguration via germ warfare.

Dotey, his lawyer and his psychologist memorialized all these comments in complaints,

> letters and videotapes to agencies including the Justice Department and the Secret Service. ARCO also forwarded Dotey's personnel file to the FBI. The Secret Service personally interviewed Dotey, his lawyer and his psychologist in connection with the Reagan assassination plot. The record also indicates that the Secret Service knew of a Dotey-related plot to kill President Bush in 1991, two years after investigation of the Matamoras site case began.

(20a-21a)

3. THE NEW TRIAL MOTION AND THE RULINGS BELOW

Based upon this shocking new evidence, Herzog moved for a new trial, pursuant to Fed. R. Evid. 33, on the governing authority of, *inter alia*, *Kyles v. Whitley*, 514 U.S. 419 (1995), and its progeny. Without even mentioning *Kyles*, the Second Circuit affirmed the denial of the motion, reasoning — erroneously — that "*Brady* was not violated because" the evidence (i) "was not material," and (ii) had not been suppressed by the government in that Herzog "had actual knowledge of [] witnesses with information about Dotey." (23a)

C. THE RULE 806 ISSUE

1. BACKGROUND

Notably, the jury *acquitted* Herzog on all charges arising prior to September 1989. Rather, its finding of liability turned upon the narrow period September through October 1989. In particular, the difference between conviction and acquittal was a series of crucial meetings allegedly held on September 13 and

15, 1989 — the *sole* direct proof of Herzog's supposed intent to defraud.

2. THE INCULPATORY EVIDENCE

According to Dotey *alone*, landfill attorney Randolph Borden hatched a plan at these alleged meetings to dump raw C&D at Matamoras, while concealing it from PADER. Specifically, Dotey claimed that Borden made the following out-of-court statements in Herzog's presence:

- Defendants should dump new, unprocessed C&D over material already at the site, while falsely telling PADER that such old material was being removed.

- "*[T]hey [Borden and defendants] were going to open the landfill [to C&D] whether they got permission or not*," and PADER's "*proposal[s] for a site assessment and closure w[ere] far too expensive, [t]he[y] didn't want to put that kind of money in the landfill and spend that money for doing those needless things....*" (T: 619) (emphasis supplied)

- The September 15 meeting was "*a big secret meeting.*" (T: 622)

- A PADER edict that there should be "no new dumping" at the site was a "*joke.*" (T: 624)

- Facetiously, "*Mr. Herzog should get a couple of the guys out there with shovels and buckets and start removing [any] contaminated waste*[, as requested by PADER]." (*Id.*)

- In defiance of PADER's instructions, defendants should bring in trucks full of new, unprocessed C&D.

- The dumping should occur as fast as possible because fines and penalties were sure to accrue. (T: 622-25, 4866-67, 4883-85)

This testimony provided damning evidence of Herzog's knowledge and intent during the pivotal period September through October 1989, prior to which the jury found his conduct to be entirely legal and devoid of *scienter*. Clearly, then, Borden's alleged out-of-court statements, as related by Dotey, were essential to the prosecution's case.

2. THE AVAILABLE IMPEACHMENT EVIDENCE

On the other hand, there was devastating impeachment evidence available which would have shown that, far from scheming to defraud PADER at the September 13 and 15 meetings, Borden and Herzog conducted themselves in good faith and *without* fraudulent intent. Thus, in a 1993 effort to avoid indictment, Borden submitted a sworn affidavit to the government that seriously undermined, if not flatly contradicted, the substance of his out-of-court declarations. In relevant part, the affidavit stated:

- "[PADER's] July 10, 1989 [stop work] Order was **no longer** in effect as of September 15, 1989, having expired by its terms ten days after issuance. The Shay group had every legal right, as of September 15, 1989, to resume activity without violating the July 10, 1989 Order .... Since the July 10, 1989 Order had expired, *it would have been incorrect for me as an attorney to advise the Shay group [at the September 15 meeting] that the Order somehow barred activity at the site*."

- At the meeting, Borden insisted that "*steps should be taken ... which would enable me to present a defensible position in court.*"

- "T]he[se] steps ... include[d] the *removal of the [alleged] lead contaminated fill*," and replacing it with "*only ... 'processed' C&D*, which ... PADER officials earlier had found tentatively acceptable on an interim basis, and as to which, I felt, *it could more persuasively be argued in court that it did not fall within PADER's authority.*" Moreover, Borden recommended that this "new fill [be] tested **before** dumping, to assure that it was not contaminated with excessive lead."

- In sum, Borden maintained that, "[a]s counsel, *it was simply my objective to be in a position to show in court that the*

> *Shay group was proceeding in good faith to remove unacceptable fill .... I did not in any respect agree to, accept or acquiesce in any plan to deceive PADER, and there was nothing which transpired, at the meeting or otherwise up to that point, which alerted me that the others did not intend to comply with the agreed-upon steps, which would allow us to present the most defensible legal position in court. In fact, I recall saying at the meeting in substance that the Shay group would have to carefully comply with the steps I outlined above*, as litigation was likely to be initiated quickly."

(A. 262-65) (bold emphases in original, italicized emphases supplied)

The affidavit was thus fundamental to Herzog's defense because it "directly involved the credibility of [Borden's damaging] out-of-court statements" at the September 13 and 15 meetings. *United States v. Friedman*, 854 F.2d 535, 570 (2d Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989). As such, it would have negated the prejudicial inference that defendants "possessed the requisite *mens rea* [*i.e.*, the necessary *scienter*] to commit the specific-intent crimes charged." *United States v. Moody*, 903 F.2d 321, 329 (5th Cir. 1990).

3. THE RULE 806 APPLICATIONS AND THE DECISIONS BELOW

On cross-examination, Herzog offered the affidavit, pursuant to Fed. R. Evid. 806,[9] to impeach Dotey's attributions to Borden, which had been admitted, under Rule 801(d)(2)(E), as coconspirator statements. (A: 212-13) In response, the Trial Court mistakenly[10] precluded impeachment of Borden through cross-examination of Dotey, *but tentatively indicated that this impeachment evidence would be permitted later*. (A: 213-14)

At the close of the government's case, Herzog renewed his Rule 806 motion, but the Trial Court reversed its preliminary view and excluded the affidavit. (A: 227 *et seq.*; 48a-50a) On appeal, the Second Circuit upheld this ruling, wrongly concluding that Rule 806 was inapplicable because (i) Borden's statements had been "properly admitted, not for the truth of the matter asserted," but simply for "the fact that they were said in the presence of the defendants;" *i.e.*, "to show defendants'

---

[9] Rule 806 provides:

> When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked ... by any evidence which would be admissible for those purposes if declarant had testified as a witness.

[10] *See* M. Graham, *Federal Practice and Procedure: Evidence* § 6811 at 217 n. 2 (Interim Ed.) (Pocket Part 1996) (citing *United States v. Burton*, 937 F.2d 324, 328 (7th Cir. 1991); *United States v. Wali*, 860 F.2d 588 (3d Cir. 1988)).

scienter," and (ii) any failure to give a limiting instruction was harmless error. (17a-19a)

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT'S CONCEPTION OF *BRADY* MATERIALITY CONFLICTS WITH *KYLES*, AS INTERPRETED ACROSS THE CIRCUITS

In holding the undisclosed "Dotey evidence" immaterial, the Second Circuit opined that it "would [not] have affected the verdict" because "the jury did not rely entirely" or "solely" upon Dotey's testimony. (23a, 25a) Rather, in the Court's view, that testimony had been "corroborated" by "independent evidence," and "otherwise []impeached." (*Id.*) Respectfully, this flawed analysis begs for closer review by this Court.

First, as a factual matter, we respectfully dispute the Second Circuit's characterization of Dotey's testimony as independently "corroborated." To the contrary, as demonstrated above and in our appellate briefs, that testimony was the *only* direct proof on the linchpin issue of Herzog's fraudulent intent — particularly with respect to the integral, "big secret" meetings of September 13 and 15, 1989. Accordingly, notwithstanding the Court's contrary view, there can be no doubt that Dotey's testimony was instrumental to Herzog's conviction.

Second, and more fundamentally, the Second Circuit applied an erroneous legal definition of *Brady* materiality. In essence, the Court's analysis focused upon whether disclosure would have changed the trial's result — basically a test of the sufficiency of the evidence apart from Dotey's testimony. However, such an approach directly clashes with *Kyles*, as construed by other Courts of Appeals. Remarkably, the Second Circuit's opinion *failed even to acknowledge Kyles*, this Court's

most recent and definitive pronouncement on the concept of *Brady* materiality. To resolve this tension, and to clarify the scope and meaning of *Brady* materiality in the wake of *Kyles*, the Court should grant this petition.

In *Kyles*, the Court squarely rejected the position taken by the Second Circuit here, stressing that *Brady* materiality "is *not* a sufficiency of the evidence test," and that "none of the *Brady* cases has ever suggested" otherwise. 514 U.S. at 434-35 and n.8 (emphasis supplied). Rather, the appropriate inquiry is whether, absent the undisclosed evidence, the defendant "received *a fair trial*;" *i.e.*, "a trial resulting in a verdict worthy of confidence." *Id.* at 434 (emphasis supplied).

Thus, as the Second Circuit itself correctly observed in another case:

> undisclosed evidence will be deemed material ... if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, --- U.S. at ----, 115 S.Ct. at 1566. *This standard does not mean that a defendant is required to show that the undisclosed evidence would have rendered the evidence as a whole insufficient to support a conviction, see id.* (test of *Brady* materiality "is not a sufficiency of evidence test"), *or that if timely disclosure had been made, acquittal would have been certain.*

United States v. Payne, 63 F.3d 1200, 1209 (2d Cir. 1995) (emphasis supplied), *cert. denied*, 116 S.Ct. 1056 (1996); *see United States v. Cuffie*, 80 F.3d 514, 518 (D.C. Cir. 1996) ("*Although the remaining evidence standing alone would have been sufficient to convict, the Brady materiality inquiry is not an assessment of the sufficiency of the evidence* .... Rather, the court

has emphasized that the *amount of additional evidence indicating guilt is not dispositive of our inquiry*") (emphasis supplied) (citations and internal quotes omitted).

Hence, contrary to the Court of Appeals' impression here, the relevant question is *not* whether the verdict rested "solely" or "entirely" on Dotey's testimony. (23a, 25a) That is *not*, and has never been, the test of *Brady* materiality. Indeed, a "solely" or "entirely" standard would make it all but impossible for *any* defendant ever to prevail upon a *Brady* claim. To state this proposition is to reject it.

Rather, the central question is whether, absent disclosure, Herzog "received a *fair trial*, understood as a trial resulting in a verdict *worthy of confidence*." *Kyles*, 514 U.S. at 434 (emphasis supplied). In other words, under *Kyles* and related cases, the issue of *Brady* materiality is driven by concerns about a trial's fundamental fairness, not concerns about its outcome or the sufficiency of the evidence.

Here, the prosecution paraded an insane but "important" witness before the jury, and unabashedly vouched for his credibility, in the face of "alarming" evidence that would have rendered him totally unworthy of belief. (16a, 23a-25a and n.15) We ask whether there could be a better example of a fundamentally unfair trial or a fundamentally unreliable verdict? The question answers itself.

Put another way, to establish materiality for *Brady* purposes, Herzog only had to show that the "'*likely impact [of disclosure] on [Dotey's] credibility would have undermined a critical element of the prosecution's case*.'" *United States v. Wong*, 78 F.3d 73, 79 (2d Cir. 1996) (emphasis supplied) (Quoting *Payne*, 63 F.3d at 1210); *see, e.g., United States v. Badalmente*, 507 F.2d 12, 17-18 (2d Cir. 1974) (*Brady* violated where disclosure of "hysterical letters" would have had

"powerful adverse effect"on witness' credibility, which was "crucial to the determination of [defendant's] guilt or innocence"), *cert. denied*, 421 U.S. 911 (1975); *East v. Scott*, 55 F.3d 996, 1003 (5th Cir. 1995).

This test is easily met here, as proof of Dotey's insanity and Nazism would have crippled his testimony on the "critical element" of Herzog's *scienter*. *Wong*, 78 F.3d at 79. In concluding otherwise, the Second Circuit departed from the foregoing principles and employed an insupportable standard of *Brady* materiality — the very sufficiency of the evidence test repudiated by *Kyles* and its progeny.

Third, and similarly, the Court's insistence that the undisclosed evidence was "cumulative" — *i.e.*, that "the jury had [other] information with which to evaluate Dotey's credibility" — also defies logic and law. (24a) As an intuitive matter, proof of a witness' insanity and Nazism is *sui generis* — qualitatively different, and on another order of magnitude, from a run-of-the-mill cross-examination concerning his dishonesty and prior bad acts. (*See* 24a) Indeed, such devastating evidence very well could have led the jury to reject Dotey's testimony altogether. Once again, the Second Circuit's contrary ruling is at odds with the overwhelming weight of post-*Kyles* cases from other Circuits.

For example, the D.C. Circuit's decision in *United States v. Cuffie* is directly on point. Consider the following parallels:

A. Just as Dotey was a "key prosecution witness" here (4a), the testimony of prosecution witness Moore was an "important part of the government's case against Cuffie." 80 F.3d at 518.

B. Just as the other evidence of Herzog's *scienter* was wholly circumstantial, the other evidence against Cuffie was entirely "circumstantial." *Id.*

C. Just as Dotey *alone* directly testified to Herzog's fraudulent intent, "[Moore] established the *only* direct connection between Cuffie and ... drugs." *Id.* (emphasis supplied).

Faced with these functionally identical facts, the Court swiftly overturned Cuffie's conviction, emphasizing

> the potential impact that the undisclosed evidence *might* have had on *the fairness of the proceedings rather than on the overall strength of the government's case* .... Evidence is material if the undisclosed information could have substantially affected the efforts of defense counsel *to impeach the witness, thereby calling into question the ultimate fairness of the verdict*.
>
> ***
>
> For these reasons we are unconvinced that the jury verdict is worthy of confidence in light of the undisclosed impeachment evidence. A cross-examination of Moore that revealed evidence casting serious doubts upon Moore's truthfulness as a witness [] *could have changed the nature of Cuffie's trial*.

Id. at 517-19 (emphasis supplied) (citations and internal quotes omitted).

Tellingly, the *Cuffie* Court *rejected* the "cumulative impeachment" rationale espoused by the Second Circuit here:

> The government contends that Moore was *thoroughly impeached at trial, such that the undisclosed evidence would have furnished only cumulative impeachment.* Yet *the fact that other impeachment evidence was available to defense counsel does* ***not*** *render additional impeachment evidence immaterial....* [W]e must look not to the ways defense counsel was able to impeach [the witness], but to the ways in which the witness' testimony was allowed to stand unchallenged.

Id. at 517-18 (emphasis supplied) (citations and internal quotes omitted); *see United States v. Hanna*, 55 F.3d 1456 (9th Cir. 1995) (ordering hearing on claim that government withheld impeachment evidence concerning primary witness even though discrepancies were fully aired at trial).

Also reminiscent of this case is *United States v. Smith*, 77 F.3d 511 (D.C. Cir. 1996), *reh'g denied*, 85 F.3d 646 (D.C. Cir. 1996). Like Dotey here, "Mr. M." was "a principal prosecution witness." 77 F.3d at 517. And as in this case, the government also "failed to disclose" at least two pieces of "impeachment evidence" with respect to Mr. M: the facts that (i) his cooperation agreement included the dismissal of two pending felony cases, and (ii) *he had a history of psychiatric problems*. *Id.* at 512.

Despite the fact that "*defense counsel was able to impeach the witness on other grounds*," the Court reversed the defendant's conviction on a fundamental fairness theory:

> Had defense counsel been armed with full disclosure regarding Mr. M's plea agreement, the witness could have been subjected to devastating cross-examination regarding his credibility.

> Given the likely impact of such cross-examination, it can hardly be doubted that the undisclosed information was sufficiently material to meet the threshold laid out in *Kyles*. *We also find that the District Court erred by failing to examine Mr. M's medical records in order to determine whether his psychiatric history constituted a relevant subject for impeachment.*
>
> ***
>
> Armed with full disclosure, defense counsel could have pursued devastating cross-examination, challenging Mr. M's assertion that he was testifying only to "get a fresh start" and suggesting that the witness might have deliberately concealed the other favors from the Government that were not in the written plea agreement. The potential impact of such a cross-examination is sufficient to undermine confidence in the jury's verdict ....
>
> ***
>
> The prosecutor's obligation to disclose material information to the defense is a fundamental component of the guarantee that criminal defendants receive fair trials. Thus, we do not lightly excuse *Brady* violations. Because the Government's nondisclosures in this case *significantly impaired defense counsel's ability to impeach the credibility of a principal prosecution witness*, we reverse and remand for a new trial.

Id. at 512-13, 516-17 (emphasis supplied); *see Banks v. Reynolds*, 54 F.3d 1508, 1516 (10th Cir. 1995) (reversing

conviction for suppressed psychiatric evidence and noting that "the primary consideration under *Brady* is fairness").

There is also *United States v. Steinberg*, 99 F.3d 1486 (9th Cir. 1996). As in this case, the government withheld various items of exculpatory evidence regarding its "key witness,"Schulz. *Id.* at 1489. In particular, the suppressed evidence indicated that Schulz (i) had been involved in counterfeiting, and (ii) owed the defendant money. *Id.* Addressing this evidence in tandem pursuant to *Kyles*, the Court agreed with the defendant that it "revealed Schulz to be untrustworthy ... in a trial where Schulz's testimony was critical." *Id.* at 1491. *Even though Schulz's credibility had been thoroughly "explored at trial,"* the Court reversed the defendant's conviction:

> [T]he jurors *may* have been less likely to believe Schulz's testimony had they known about the withheld evidence. The withheld evidence showed that Schulz was engaged in ongoing criminal activities during the time that he was acting as a Government informant in the present case. The withheld evidence also showed that Schulz owed defendant some money, giving him a motive to lie to get Steinberg locked up.
>
> ***
>
> Informant Schulz was the government's key witness in the trial. Thus, his credibility as a witness was an important issue in the case. Evidence that he was engaged in ongoing criminal activity and owed the defendant money was relevant to his credibility, and the defendant was entitled to have the jury know about it. *See United States v. Brumel-Alvarez*, 991 F.2d 1452, 1463 (9th Cir. 1992).

Id. at 1491-92 (emphasis supplied); *see Guerra v. Johnson*, 90 F.3d 1075 (5th Cir. 1996).

Plainly, then, the Second Circuit's holding here — that Dotey's testimony was subject to alternative forms of impeachment — cannot be harmonized with the rule of the above cases: that "undisclosed impeachment evidence can be immaterial because of its cumulative nature *only* if the witness was already impeached at trial by *the same kind of evidence*." *Cuffie*, 80 F.3d at 518 (footnote omitted) (emphasis supplied); *see United States v. O'Conner*, 64 F.3d 355, 359 (8th Cir. 1995), *cert. denied*, 116 S.Ct. 1581 (1996).

***

By speculating that the undisclosed Dotey evidence "would [not] have affected the verdict" in this case (25a), the Second Circuit has, in the final analysis, invaded the province of the fact-finder here. From the perspective of a cold appellate record, it has, in effect, stepped into the jury box and assumed the role of a thirteenth juror. In the best of circumstances, predicting a jury's reaction to a given piece of evidence is a notoriously risky, if not impossible, proposition — one fraught with guesswork. Indeed, we suspect that this very recognition was what drove the *Kyles* decision in the first place. This being so, the Second Circuit's opinion here represents the edge of a slippery slope indeed — one that will erode *Brady* into irrelevance unless this Court intervenes.

In the end, then, this case presents the Court with an opportunity to delimit the contours of *Brady* materiality, and clear up the Circuit Courts' evident confusion on this issue once and for all. We therefore respectfully ask: What did the Court really mean when it decided *Kyles*? Did it really intend, as

many Circuits agree, to replace *Bagley*'s[11] outcome-oriented definition of materiality with a test of fundamental fairness? Or does the *Bagley* definition — "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," 473 U.S. at 682 — survive *Kyles*? The lower courts must confront these questions with unfortunate frequency, and they would benefit from this Court's guidance on the issue.[12]

---

[11] *United States v. Bagley*, 473 U.S. 667 (1985).

[12] In addition, the Second Circuit opined that the undisclosed evidence had not been suppressed because "[a]ppellants had actual knowledge of witnesses with information about Dotey." (23a) However, the issue here is *not* whether Herzog knew about such witnesses, but whether the government disclosed Dotey's psychiatric history? For absent such disclosure, Herzog would have had no reason to suspect Dotey's mental problems, and thus no reason to ask the witnesses about them.

In other words, merely disclosing the identity of relevant witnesses, without the information necessary to take advantage of them, is tantamount to no disclosure at all. *See, e.g., United States v. Zackson*, 6 F.3d 911, 918 (2d Cir. 1993) (*Brady* is violated where government conceals "the essential facts" necessary "to take advantage" of otherwise available information) (quoting *United States v. LeRoy*, 687 F.2d 610, 618 (2d Cir. 1982), *cert. denied*, 459 U.S. 1174 (1983)). Viewed in this light, Herzog's mere knowledge of the witness' existence is simply irrelevant here. *See Banks*, 54 F.3d at 1517 ("[T]he prosecution's obligation to turn over [] evidence in the first instance stands independent of the defendant's knowledge"). (footnote omitted).

II. THE SECOND CIRCUIT'S APPLICATION OF RULE 806 IN THIS CASE CONFLICTS WITH ITS OWN PRECEDENT AND THAT OF OTHER CIRCUITS

Fed. R. Evid. 806 "allows one to impeach the credibility of a non-testifying hearsay declarant" — or a person whose out-of-court statements have been admitted into evidence under Rule 801(d)(2) — "by any evidence that would be admissible had the declarant testified." *Burton*, 937 F.2d at 328. This includes "prior or subsequent inconsistent statements." *United States v. Graham*, 858 F.2d 986, 990 (5th Cir. 1988), *cert. denied*, 489 U.S. 1020 (1989); *see, e.g., United States v. Rosario*, 111 F.3d 293, 295-96 (2d Cir. 1997) (confirming that "Rule 806 permits impeach[ment of] ... co-conspirator's statements admitted into evidence under Rule 801(d)(2)(E)"), *petition for cert. filed* (U.S. Sept. 2, 1997) (No. 97-5845); *Wali*, 860 F.2d at 591-92; *Moody*, 903 F.2d at 327.

Here, the Court of Appeals deemed Rule 806 inapplicable and upheld the exclusion of Borden's affidavit on two principal grounds. *First*, the Court concluded that Bordén's incriminating, out-of-court statements had been "properly admitted, not for the truth of the matter asserted," but merely "for the fact that they were said in" defendants' presence; *i.e.*, "simply to show defendants' *scienter*." (17a-19a) That is, the Court held that Borden's statements were "correctly admitted ... as non-hearsay rather than as co-conspirator statements," and therefore did not implicate Rule 806. (18a) *Second*, while expressing "concern[]" about the Trial Court's "failure to grant a limiting instruction as to" the statements' purpose, the Court dismissed this refusal as, at most, "harmless error." (18a-19a) Once again, these determinations cry out for deeper analysis by this Court.

First, the Second Circuit's opinion rests upon a faulty premise: that Borden's statements actually were admitted "as non-hearsay rather than as co-conspirator statements." (18a) In fact, this was merely a *revisionist justification* offered by the Trial Court long after the fact. When the Trial Court admitted the statements, it promised Herzog a subsequent opportunity to impeach them with Borden's affidavit. Indeed, the Second Circuit itself expressly acknowledged as much. (17a) Hence, contrary to the Court of Appeals' complaint, Herzog had no reason to object to the statements "at the time the[y] ... came into evidence," to "request a limiting instruction at that time,"[13] or to otherwise elicit the specific rationale for the statements' admission. (18a)

Rather, it was only later — when the Trial Court barred the impeachment that it had promised — that the purpose of the statements first became an issue. Then and only then did the government and the Trial Court begin to espouse retrospective justifications for the statements' offer and receipt. *Compare United States v. Trzaska*, 111 F.3d 1019, 1025-26 (2d Cir. 1997). Hence, to assert that the statements were admitted "as non-hearsay rather than as co-conspirator statements" (18a) is to imbue the record with an artificial sense of clarity that it simply does not possess.

---

[13] As detailed in our appeal briefs, and notwithstanding the Second Circuit's characterization, the limiting instruction ultimately requested by defendants cannot fairly be called "inappropriate." (18a) Rather, the requested instruction — that Borden's statements were only admissible on the issue of intent — tracked *the prosecutor's* own position. Equally unfair is the Court's charge that Herzog wrongly "rel[ied] upon" the limiting instruction sought by codefendant Christiansen. (*See* 19a) In fact, the District Court had imposed a "one objection for all 11 defendants rule" to cope with trial management problems.

In fact, any fair reading of the record makes it abundantly clear that the statements were offered and received as (a) vicarious admissions under Rule 801(d)(2), and/or (b) statements of intent under Rule 803(3). Under either or both of these scenarios, Rule 806 plainly entitled Herzog to impeach the statements with Borden's affidavit. *See United States v. Velasco*, 953 F.2d 1467, 1473 n.5 (7th Cir. 1992) (Rule 806 applies by its terms to agents' admissions within Rule 801(d)(2)(D), and applies *sub silentio* to adoptive admissions within Rule 801(d)(2)(B)); *United States v. Wuagneux*, 683 F.2d 1343, 1357-58 (11th Cir.1982) (statements admitted as hearsay "exceptions" — *e.g.*, declarations of intent under Rule 803(3) — are also subject to Rule 806 impeachment), *cert. denied*, 464 U.S. 814 (1983).

Thus, the government argued strenuously in summation that *Borden's* statements strongly implied guilty knowledge and intent on *Herzog's* part. (*See, e.g.*, T: 5732-33, 6391-92) Yet, this inference would only make sense if Herzog had manifested some belief in the statements' truth; *i.e.*, if they were vicariously attributable to him as coconspirator admissions, adoptive admissions (*see* Fed. R. Evid. 801(d)(2)(B)) and/or admissions by Borden in his representative capacity as Herzog's agent/attorney (*see* Fed. R. Evid. 801(d)(2)(D)). As noted above, all of the foregoing are well within the scope of Rule 806 impeachment.

Indeed, Borden's statements were, on their face, quintessential coconspirator admissions; *i.e.*, direct declarations of the alleged conspiracy's existence, objects and means. To this end, we note that *both the prosecutor and the indictment explicitly and repeatedly referred to Borden as a coconspirator.* (T: 5656-57, 6503) Thus, if Borden's statements were *not* those of a coconspirator, we ask a series of questions:

1. Why, in rejecting Herzog's claim that the statements were protected by the attorney-client privilege, did the Court retort that they were "*at least arguably in furtherance of an attempted fraud*"? (T: 648) (emphasis supplied)

2. Why did the government, in the middle of the trial, expressly characterize Borden as a "*co-conspirator*"? (T: 696) (emphasis supplied)

3. Why did the Court subsequently admit that the Borden declarations had been received as "*co-conspirator's statement[s]*"? (T: 5656) (emphasis supplied)

4. Why, in opposing Herzog's prospective limiting instruction that the "*statements can't be used as coconspirator statements*," did the government vigorously protest "*[t]hat's incorrect[; t]hat's an incorrect statement of the record*"? (T: 5660) (emphasis supplied)

5. Why, in resisting Herzog's request to immunize Borden, did the government emphatically insist that he was still under investigation as a coconspirator? (T: 5097)

Put simply, the Court of Appeals failed to grapple with these questions, which admit of only one credible answer: Borden's statements clearly *were* coconspirator statements, and Herzog clearly *was* entitled to impeach them under Rule 806.

Alternatively, the inference of *scienter* pressed in the prosecutor's summation shows that the statements served as declarations of *Borden's* knowledge and intent (*see* Fed. R. Evid. 803(3)) and, as such, circumstantial proof of *Herzog's* knowledge and intent. Indeed, the prosecutor himself expressly conceded as much. (T: 5658) Hence, however else the statements might have been *received* — as coconspirator, adoptive, or agent's admissions, declarations of intent or some

hybrid thereof — they were *not offered*, and certainly were not *used*, for the mere "fact that they were said." (18a)

Second, in rejecting these contentions, the Second Circuit jettisoned its own methodology as set out in *United States v. Trzaska*, decided just two weeks after this appeal. In *Trzaska*, the Court stated as follows:

> Trzaska argues that he did not offer his statement to his son to prove the truth of the matter asserted, that therefore the statement was not hearsay, and that therefore the government could not impeach him. *See* Fed. R. Evid. 806. Unlike most situations in which a court decides whether a statement is hearsay, here, the government did not object to Trzaska's statement, and *it was only later, when the government asserted that the statement was hearsay and sought to impeach Trzaska, that a question arose as to the purpose for which the statement was offered.* This raises the issue — *how should a court determine the purpose for which a statement was offered in this situation? The rule could be that the statement was offered for* ***all*** *purposes to which it was relevant* — if this were the rule, Trzaska could be impeached because the statement was clearly relevant to proving the truth of the matter asserted. On the other hand, *the rule could be that the statement was offered only for the purpose for which the proponent intended at the time it was offered* — if this were the rule, Trzaska could not be impeached, as our review of the record indicates that Trzaska probably intended that his statement not come in for the truth of the matter asserted, but rather as a verbal act to show that he

> disclaimed an interest in the guns and thereby gave them to his son.

111 F.3d at 1026 (emphasis supplied).

Trzaska is squarely on point, and should have controlled here. As the above passage shows, *Trzaska* suggests two approaches for determining the basis upon which statements have been admitted for Rule 806 purposes. Under either one, Rule 806 impeachment plainly was appropriate here.

The first *Trzaska* approach is that statements be deemed offered "for *all* purposes to which [they are] relevant." *Id.* (emphasis supplied) This test is readily satisfied here, as Borden's statements were clearly relevant as vicarious admissions and/or declarations of intent — even if they also might have been relevant as "non-hearsay," received for the fact that they were made in defendants' presence. (18a)

The second *Trzaska* approach is that statements be deemed "offered *only* for the purpose" intended by the proponent. *Trzaska*, 111 F.3d at 1026 (emphasis supplied). This test is also satisfied here:

- As in *Trzaska*, a fair "review of the record indicates that [the government] probably" offered Borden's statements as coconspirator admissions pursuant to Rule 801(d)(2)(E). *Id.*; *see supra* 24a-27a.

- Moreover, the prosecutor himself later professed to have offered the statements as declarations of intent under Rule 803.

As previously explained, Rule 806 permits impeachment in either or both of these circumstances.

Yet, despite the cases' uncanny resemblance — in both, the purpose of the statements did not become an issue until long after their admission — the Court here failed to follow, or even consider, either of the *Trzaska* approaches. Rather, it simply accepted the Trial Court's *ex post* justifications at face value. Clearly, then, the two cases cannot be reconciled. This being so, a grant of *certiorari* is warranted on *stare decisis* grounds alone.

Third, the claim that the statements were "properly admitted" for the fact that they were made in defendants' presence — *i.e., "to show defendants' scienter*" — actually makes our point here. (19a) (emphasis supplied) Plainly, the mere fact that the statements were made in defendants' presence does *not* necessarily mean that defendants agreed with them. Rather, as noted earlier, *Borden's* statements could only show *defendants' scienter* if defendants manifested a belief in their truth; that is, if the statements could somehow be imputed to defendants themselves. And, to reiterate, this could only occur if the statements were offered as (a) adoptive, agent's or coconspirator admissions under Rule 801(d)(2), and/or (b) statements of Borden's intent, and thus circumstantial evidence of defendants' intent, under Rule 803(3). Were it otherwise, the mere fact that the statements were made in defendants' presence would have no bearing on the critical issue of defendants' *scienter*, and thus no relevance to this case. Hence, on *the Second Circuit's own rationale,* there can be no doubt that Rule 806 impeachment should have been allowed here.

Fourth, and finally, the Second Circuit's opinion not only misses our point about the absence of a limiting instruction, but runs afoul of the Seventh Circuit's decision in *United States v. Burton*. Put simply, the question here is *not* merely whether "the failure to give [such] an instruction was error," or even

"harmless error." (19a) Rather, as *Burton* held, the more fundamental point is that, without an instruction, statements allegedly offered for non-hearsay purposes *must* be construed as hearsay and/or coconspirator statements, subject to Rule 806 impeachment. 937 F.2d at 331 and n.4. This conflict alone is reason enough for the Court to hear this case.[14]

CONCLUSION

This petition should be granted.

Respectfully submitted,

BURSTEIN & FASS LLP
99 Park Avenue
New York, New York 10016
(212) 681-0606

On the Petition:
Judd Burstein*
Marc Fernich

**Counsel of Record*

---

[14] In addition, the Second Circuit opined that "[d]efendants ... could have presented conflicting testimony as to what was discussed at those [September 13 and 15] meetings to refute Dotey's recollection." (19a). Respectfully, this suggestion impermissibly shifts the burden of proof.